

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

MONA HUSSIEN FAWAZ,

Defendant-Appellee.

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UNPUBLISHED

June 17, 2014

No. 315647

Wayne Circuit Court

LC No. 11-001736-FH

Before: O'CONNELL, P.J., and FITZGERALD and MARKEY, JJ.

PER CURIAM.

Defendant was convicted by a jury of arson of a dwelling unit, MCL 750.72, arson of insured property, MCL 750.75, and two counts of fraudulent insurance acts, MCL 500.4511(1). Defendant was originally sentenced to five years' probation, despite a sentencing guidelines range of 24 to 40 months. The prosecution appealed the trial court's sentencing decision, and this Court previously ruled that the trial court had misscored offense variable ("OV") 3 and OV 9, but declined to address the departure issues in light of the remand for resentencing. *People v Fawaz*, 299 Mich App 55, 60-64; 829 NW2d 259 (2012). On remand for resentencing, the trial court again sentenced defendant to five years' probation, despite the sentencing guidelines range increasing to 30 to 50 months. The prosecution appeals as of right. We reverse and remand for resentencing.

"A judge of a court having jurisdiction may pronounce judgment against and pass sentence upon a person convicted of an offense in that court." MCL 769.1(1). The circuit court has the responsibility to impose a sentence within the limits set by the Legislature. *People v Hegwood*, 465 Mich 432, 437; 636 NW2d 127 (2001). The courts are subject to the guidelines with sentencing ranges for incidents that occurred after January 1, 1999. See MCL 777.1 *et seq.*; MCL 769.34(1). When a court departs from the legislative sentencing guidelines range, it must state on the record a substantial and compelling reason. MCL 769.34(3); *Babcock*, 469 Mich at 256. A substantial and compelling reason is "an objective and verifiable reason that keenly or irresistibly grabs our attention; is of considerable worth in deciding the length of the sentence; and exists only in exceptional cases." *People v Young*, 276 Mich App 446, 449-450; 740 NW2d 347 (2007). The court's reasons for departing must be objective and verifiable. *People v Babcock*, 469 Mich 247, 272; 666 NW2d 231 (2003). "To be objective and verifiable, a reason must be based on actions or occurrences external to the minds of those involved in the decision, and must be capable of being confirmed." *People v Havens*, 268 Mich App 15, 17; 706 NW2d

210 (2005). Furthermore, a departure from the guidelines range must render the sentence proportionate to the seriousness of the defendant's conduct and prior criminal history. *People v Smith*, 482 Mich 292, 300, 305; 754 NW2d 284 (2008).

A sentencing court "shall not use an individual's gender, race, ethnicity, alienage, national origin, legal occupation, lack of employment, representation by appointed legal counsel, representation by retained legal counsel, appearance in propria persona, or religion to depart from the appropriate sentence range." MCL 769.34(3)(a). Further, "[t]he court shall not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight." MCL 769.34(3)(b).

This Court reviews de novo issues concerning the proper application of the statutory sentencing provisions. *Hegwood*, 465 Mich at 436. Statutory interpretation presents a question of law that is also reviewed de novo. *People v Droog*, 282 Mich App 68, 70; 761 NW2d 822 (2009). In reviewing a trial court's grounds for departing from the sentencing guidelines, this Court reviews for clear error the trial court's factual finding that a particular factor in support of departure exists. *Babcock*, 469 Mich at 264. However, the determination of whether the factor is objective and verifiable is a question of law that this Court reviews de novo. *Id.* Finally, this Court reviews for an abuse of discretion the trial court's determination that the objective and verifiable factors present in a particular case constitute substantial and compelling reasons to depart from the statutory minimum sentence, as well as the amount of departure. *Id.* at 264–265. An abuse of discretion occurs when the trial court chooses an outcome falling outside the permissible range of reasonable and principled outcomes. *Id.* at 269.

At the resentencing hearing, the trial judge stated that his decision to again sentence defendant to probation, a downward departure from the sentencing guidelines range, was based upon defendant's substantial compliance with her probation requirements to date, as well as all of the reasons he had provided at the first sentencing hearing. The reasons for departure given at the initial sentencing hearing were that the two convictions for fraudulent insurance acts were more ancillary to the actual crime than most concurrent convictions, and without those convictions, defendant would not have been scored 20 points under PRV 7 and would have ended up in a "straddle cell." "If the upper limit of the minimum sentence range exceeds 18 months and the lower limit is 12 months or less, the defendant's sentence range is in a 'straddle cell.'" <sup>1</sup> *People v Harper*, 479 Mich 599, 617; 739 NW2d 523, 534 (2007).

First, the trial court's reasoning that defendant's guidelines range would have been in a "straddle cell" without the two fraudulent insurance acts convictions is legally incorrect. The trial court scored 20 points under PRV 7 because defendant was charged with two or more concurrent felonies. Defendant had a total PRV score of 22 points. However, 10 points should

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<sup>1</sup> When the range is in a straddle cell, the sentencing court may elect either to sentence the defendant to a prison term within the minimum portion of the indeterminate sentence within the guidelines range or to impose an intermediate sanction, absent a departure. MCL 769.34(4)(c).

be assessed for PRV 7 if “[t]he offender has 1 subsequent or concurrent conviction.” MCL 777.57(1)(b). Defendant was convicted of (1) arson of a dwelling house, (2) arson of insured property, (3) a fraudulent insurance act, and (4) a second fraudulent insurance act. Even excluding the two convictions for fraudulent insurance acts, defendant was still convicted of two counts of arson, i.e., “1 . . . concurrent conviction,” meriting the assessment of 10 points under PRV 7. MCL 777.57(1)(b). An assessment of 10 or more PRV points places defendant outside of the “straddle cells,” regardless of the assessment of any OV points. MCL 777.63. Therefore, the trial judge clearly erred in finding that the “ancillary” crimes of fraudulent insurance acts removed defendant’s sentence guidelines range from a “straddle cell.”

Further, defendant’s subsequent or concurrent convictions are “an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range.” MCL 769.34(3)(b). The trial judge did not explain why he determined, from the facts contained within the record, that defendant’s concurrent convictions for additional criminal acts were given “inadequate or disproportionate weight.” MCL 769.34(3)(b).

Second, the trial judge supported his decision to depart from the sentencing guidelines on defendant’s substantial compliance with the conditions of her original sentence of probation. However, defendant did receive one probation violation for her failure to maintain restitution payments. A defendant’s limited compliance with probation, but that includes a probation violation, is not the type of reason that “keenly or irresistibly grabs” a sentencing court’s attention in order to support a substantial and compelling reason for departure. *Young*, 276 Mich App at 449. In fact, a probation violation has been found by the Supreme Court to be a substantial and compelling reason for which a sentencing court could *upwardly* depart from sentencing guidelines. See *People v Hendrick*, 472 Mich 555, 560-561; 697 NW2d 511 (2005) (“The act giving rise to a probation violation may provide a substantial and compelling reason to depart from the legislative sentencing guidelines.”).

Finally, the trial court did not provide any reason why the departure from the guidelines range rendered the sentence more proportionate to the seriousness of defendant’s conduct and prior criminal history than a sentence within the guidelines recommendation, as required by existing case law. *Smith*, 482 Mich at 305. “A sentence cannot be upheld when the connection between the reasons given for departure and the extent of the departure is unclear.” *Id.* at 304. Therefore, resentencing is required.

Reversed and remanded for resentencing consistent with this opinion. We do not retain jurisdiction.

/s/ Peter D. O’Connell  
/s/ E. Thomas Fitzgerald  
/s/ Jane E. Markey